



ALTERNATIVE BUSINESS SOLUTIONS

THE 3 OPTIONS:

- 1-E.R. 5.4 Amendment
- 2-E.R. Waivers for Pilot ABSs
- 3-Eliminate E.R. 5.4

ALTERNATIVE BUSINESS SOLUTIONS

Chief Considerations:

- Client Protection
- Lawyer Independent Professional Judgment

E.R. 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of ER 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (4) a lawyer may share court-awarded legal fees or fees otherwise received and permissible under these rules with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

E.R. 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER (CONT'D)

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

E.R. 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER (CONT'D)

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

E.R. 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

E.R. 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER (COMMENT CONT'D)

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also ER 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

OPTION 1 E.R. 5.4 AMENDMENT

- Goal is to open business possibilities further than the Washington DC model, which requires:
 1. The partnership's sole purpose is providing legal services to clients.
 2. All persons with management authority or financial interest abide by Rules of Professional Conduct,
 3. and to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1, and
 4. these conditions are set forth in writing.

OPTION 1

E.R. 5.4 AMENDMENT (CONT'D)

- Allows for passive investment.
- Requires general disclosure to clients.
- Requires registration of ABS with the State Bar.
- Issue of whether non-lawyer partners are regulated.
- Challenging to regulate a variety of unanticipated business models.
- Allows for reciprocity.
- Includes metrics measure.
- *See strikethrough version, courtesy of Workgroup Member Pat Sallen.*

OPTION 2

E.R. WAIVERS FOR PILOT ABS

- The “Lassiter” proposal
- Case by case approval
- Temporary basis
- Allows for many different and creative types of business models
- Requires creation of Az Supreme Court oversight committee
- Guided by objective regulatory principles
- Investors unlikely to venture in for a “trial basis.”

OPTION 3 ELIMINATE E.R. 5.4

- The “Shely” proposal
- Current 5.4 eliminated
- Emphasize lawyer independence in E.R. 1.2
- Address ABS conflict issues with additional language or comments to E.R. 1.7
- Does not limit itself to regulation of “Lawyers.”
- Instead, regulates the “Delivery of Legal Services.”

OPTION 3 ELIMINATE E.R. 5.4 (CONT'D)

- Amend Rule 1.8(a) & (i) to permit passive investment.
- Eliminate Rule 1.17(a) & (b), which restrict the sale of law practices to other lawyers.
- Multi-jurisdictional practice issues and advertising rules may also need revision consistent with the overall plan.

OPTION 3 ELIMINATE E.R. 5.4 (CONT'D)

- **Lynda C. Shely**-(Arizona) ABA Standing Committee on Ethics and Professional Responsibility, Member. Past Chair of the ABA Standing Committee on Client Protection.
- **Jayne Reardon**-(Illinois) Executive Director of the Illinois Supreme Court Commission on Professionalism. Past Chair of the ABA Standing Committee on Professionalism. Developed and oversees statewide lawyer mentoring program and professional responsibility education. Developer and host of "The Future is Now" Conference.
- **Art Lachman**-(Washington) Practice focused on legal ethics, professional liability, and law firm risk management. Co-Chair of the Association of Professional Responsibility Lawyers (APRL) Lawyering Committee. Past President of APRL and Chair of the ABA Center for Professional Responsibility's National Conference Planning Committee.

OPTION 3 ELIMINATE E.R. 5.4 (CONT'D)

- Lynda C. Shely, Jayne Reardon and Art Lachman have been studying the options for Alternative Business Solutions for the past 20 years.
- Some were part of the ABA movement that was ultimately not put to a vote.
- The three have volunteered to help us with a first draft of how to properly and carefully approach Option 3.

Results of Workgroup Discussion

Not all workgroup members have weighed in yet.

Opportunity for further discussion at today's meeting.

To date, the majority favors Option 3, followed by Option 2 and lastly Option 1.

TASK FORCE DISCUSSION

OPTION 1
E.R. 5.4
AMENDMENT

OPTION 2
E.R.
WAIVERS
FOR PILOT
ABS

OPTION 3
ELIMINATE
E.R. 5.4